



National Association of Insurance
and Financial Advisors

August 2, 2018

Via Electronic Filing – www.sec.gov

Chairman Jay Clayton
c/o Brent J. Fields
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

**RE: File No. S7-08-18 – Form CRS Relationship Summary & Restrictions on the Use of
Certain Names and Titles and Required Disclosures**

File No. S7-07-18 – Regulation Best Interest

Dear Chairman Clayton:

The National Association of Insurance and Financial Advisors (“NAIFA”) appreciates this opportunity to comment on the Securities and Exchange Commission’s (“SEC”) proposed Regulation Best Interest, Form CRS, and titling restrictions for broker-dealers (“BDs”) and registered representatives (“RRs”) (collectively, the “proposal”).¹ NAIFA supports a best interest standard of conduct for securities-licensed firms and individuals, and we appreciate the SEC’s considerable efforts to establish such a standard *without* imposing unduly prescriptive or burdensome implementation or compliance requirements. The SEC’s general approach, we believe, will preserve choices for consumers at all income levels and account sizes – and should not unnecessarily increase costs for consumers or businesses.

NAIFA has concerns about certain elements of the proposal, which we believe can be resolved in the final proposal. Specifically, as explained in detail below, we urge the SEC to significantly revise its proposal as follows:

- (1) Refine the proposed titling restrictions for BDs and RRs to restrict use of “investment advisor/adviser,” rather than “advisor” and “adviser,” which are used ubiquitously throughout the financial services industry; and

¹ SEC, Proposed Rule, Regulation Best Interest, 83 Fed. Reg. 21574 (May 9, 2018); SEC, Proposed Rule, Form CRS Relationship Summary; Amendments to Form ADV; Required Disclosures in Retail Communications and Restrictions on the Use of Certain Names or Titles, 83 Fed. Reg. 21416 (May 9, 2018).

- (2) Streamline the proposed disclosure obligations to make them more meaningful for consumers.

Below we provide specific comments on those elements of the proposal that will be most impactful for Main Street investors and all clients served by NAIFA members.

EXECUTIVE SUMMARY

First and foremost, NAIFA strongly supports and applauds the SEC's engagement in these issues. As the primary regulator for broker-dealers and registered representatives, the SEC possesses unique expertise regarding financial services markets, products, professionals, and business arrangements. We have and will continue to encourage other regulators – to the extent they too engage in this space – to work with the SEC to develop reasonable, effective, and harmonized standards and compliance requirements.

NAIFA's members' primary focus is on the middle market and achieving the best possible standard and regulatory framework for those individuals and families. NAIFA members are predominantly "Main Street advisors"² who work primarily with lower and mid-market clients to help these consumers build a safe and sound financial future for their families. Vital to achieving this goal is maintaining consumer choice and access by small account holders to products they want to buy, professional advice and investment education, and advisor compensation arrangements that are realistic for and beneficial to the client. In addition, regulations should not impose unnecessary costs and burdens on businesses or consumers, or be more prescriptive than necessary.

There simply is no one-size-fits-all investment scenario that is appropriate for all Americans. Flexibility and diversity of options are essential. While upper-market investors usually have access to a variety of investment options and business models, low- and middle-income consumers are often cut off from access to types of advice and services that entail significant account minimums, high upfront fees, or other financial barriers beyond the means of many Main Street investors. NAIFA therefore supports the SEC's principles-based Regulation Best Interest, which:

- Puts clients' interests above firms' and advisors' interests when investment recommendations are given, and requires/focuses on individualized and thorough analysis of the appropriateness of a recommendation to a particular client;
- Is product- and compensation-neutral, which allows for the sale/recommendation of diverse products under compensation arrangements that make sense for all types of investors;

² For purposes of this comment letter, the term "advisor" refers generally to a NAIFA member who provides professional advice to clients in exchange for compensation and is not intended to connote any particular licensing and/or regulatory status. As used herein, "investment adviser" refers specifically to advisers and their representatives regulated under the Investment Advisers Act of 1940.

- Contains clear disclosure obligations, including disclosure of all material conflicts of interest, types of compensation involved, and the best interest standard to which the advisor must adhere;
- Appropriately calls for policies and procedures to be established at the firm level to address conflicts of interest; and
- Utilizes existing federal enforcement mechanisms, rather than the private plaintiffs' bar and state courts to enforce and interpret the new regime.

We also support simple, concise, and meaningful disclosures for consumers. While we believe the SEC's disclosure-related proposals could be streamlined and simplified, we agree with the intent behind them and appreciate the SEC's efforts to allow for flexibility in design and delivery.

Most problematic from NAIFA members' perspective is the SEC's proposed titling restrictions for BDs and RRs. NAIFA urges the SEC to withdraw this portion of its proposal because:

- It is not a necessary restriction, given the other components of the SEC's proposal, which are designed to clearly communicate BDs' and RRs' roles, product/account offerings, compensation, and their heightened "best interest" duty of care;
- Restricting use of the words "advisor/adviser" for BDs and RRs *only* – and not for numerous other professionals using those words and delivering advice on a wide variety of financial topics (e.g., various insurance products, college funding, home ownership and real estate, risk management, estate planning, tax, charitable giving, etc.) – creates *more* consumer confusion and does *not* enhance consumers' understanding of the specific obligations and standards that apply to their advisor(s);
- Consumers do not equate "advisor/adviser" with registered investment advisers (IAs) or investment adviser representatives (IARs),³ nor are they familiar with the specific licensure/registration requirements or duties of care associated with particular statutes (e.g., the Investment Advisers Act of 1940) or titles; and
- Straightforward disclosures are a far better and more direct way for consumers to clearly understand the duties and obligations applicable to their advisors, as well as the products and services offered under what terms – regardless of title.

We encourage the SEC to finalize its proposal with the clarifications and changes suggested herein. Moreover, we urge you to coordinate with other regulators (both state and federal) to ensure that any future conduct standards are reasonable and workable, helpful – not harmful – to

³ On the other hand, the title "**investment** advisor/adviser" is a defined term and indicates coverage under a specific regulatory regime. NAIFA does, therefore, support clearly prohibiting the use of "**investment advisor**/adviser" by anyone not registered as an IA or IAR under section 203 of the Investment Advisers Act of 1940 or with a state.

middle market investors, and that such standards (and related compliance obligations) do not create a regulator/regulation-driven market in place of a consumer-driven market.

BACKGROUND: NAIFA MEMBERS AND THEIR CLIENTS

Founded in 1890 as The National Association of Life Underwriters (NALU), NAIFA is one of the nation's oldest and largest associations representing the interests of insurance and financial services professionals. NAIFA members assist consumers by focusing their practices on one or more of the following: life insurance and annuities, health insurance and employee benefits, retirement planning, multiline, and financial advising and investments. NAIFA's mission is to advocate for a positive legislative and regulatory environment, enhance business and professional skills, and promote the ethical conduct of its members.

I. Overview of NAIFA Members

NAIFA's active members – all of whom are state-licensed insurance producers, and a majority of whom are also registered representatives of a broker-dealer – are Main Street advisors who serve primarily middle-market clients, including individuals and small businesses.⁴ In some cases, our members work in areas that have a single financial advisor serving multiple counties. During the course of the advisor-client relationship, our members provide advice in the asset accumulation phase (when clients are saving for retirement), as well as the distribution phase (during retirement), which is especially critical for low- and middle-income investors. NAIFA members educate their small business owner clients about the need to establish retirement savings plans for their employees, recommend products and plans that are specifically tailored to the unique needs of each client, and then help them to implement those plans.

Many of our members work in small firms – sometimes firms of one – with little administrative or back office support. Often, their business practices are dictated by the broker-dealer, insurance company, or independent intermediary with which they work, including the format and provision of client forms and disclosures. They also are subject to transaction-level oversight and review by their supervising financial institutions.

The investment products most commonly offered by NAIFA members are annuity products (fixed and variable) and mutual funds. Approximately two-thirds of NAIFA members sell securities products, and roughly one-third of NAIFA members work in the independent channel with independent marketing organizations or similar independent institutions. Others are affiliated with (or captives of) product providers and are restricted to some degree in the products they are permitted to sell (i.e., proprietary products).

All active NAIFA members hold insurance producer licenses in one or more states; in addition, two-thirds of NAIFA members hold either a Series 6 or Series 7 securities license as registered

⁴ According to a recent survey of NAIFA members, about 75% provide services to plan sponsors and/or small businesses.

representatives, and approximately one-third of our members are dually registered as registered representatives and investment advisers/investment adviser representatives. As a result, NAIFA members already are subject to a comprehensive regulatory/oversight regime consisting of state insurance laws, state and federal securities laws, and the compliance policies and procedures of their affiliated financial institutions.

According to a December 2010 NAIFA-commissioned survey by LIMRA, a research trade association for the financial services industry, compliance-related activities take up a significant amount of NAIFA members' time and resources. NAIFA members who sell securities spend an average of 526 hours each year, including staff time, on compliance matters.⁵ In addition, they spend an average of \$8,878 per year on exam expenses, compliance-related fees, and staff expenses devoted to compliance.⁶

II. Profile of NAIFA Members' Main Street Clients

Given the current savings crisis in the United States, NAIFA members' role in serving middle-market clients and communities is more important than ever. Americans – particularly those served by NAIFA's members – must be encouraged to save, and in order to do so in the most effective and efficient way, they must have access to professional advice and appropriate, diverse investment products for their particular needs (with compensation arrangements for services and products that make sense for them).

Only 11% of NAIFA members' clients have annual household incomes of more than \$250,000, and 58% of our members' clients have household incomes below \$100,000.⁷ Notably, 55% of investors with household incomes between \$50,000 and \$99,000 said they have some money they could invest, but only 17% of those investors reported that they could invest \$3,000 or more per year – an amount well short of current account minimums for fee-based investment accounts.⁸

Not surprisingly, guaranteed income products are particularly important for NAIFA members' clients (i.e., lower- and middle-income investors) to achieve long-term financial security and independence. Having enough money to last throughout retirement is a top concern for Americans, particularly those who do not have a lot of resources to invest. We are aware of only three ways to receive guaranteed income in retirement – annuities, Social Security, and defined benefit pensions – which explains why annuity products have historically been trumpeted by

⁵ LIMRA Survey (2010) (hereinafter "LIMRA 2010 Survey"), available at www.naifa.org/ServingMainStreetInvestors/documents/LIMRASurveyResults.pdf.

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

regulators and other government officials as a valuable private-market solution,⁹ particularly in light of the decline in recent years of employer-provided defined benefit retirement plans.

Moreover, traditional commission-based compensation models typically *benefit* low- and middle-income investors like NAIFA members' clients. Unlike for high-wealth consumers, the alternatives to commission-based compensation arrangements – upfront advisory fees with ongoing asset management fees, and wrap account arrangements – are not workable or palatable for many of our members' Main Street clients. In fact, a 2011 survey of 25.3 million IRA accounts found that a large majority of IRA investors opted for commission-based arrangements over fee-based arrangements, and low-balance account holders favored commission-based arrangements at an even higher rate – for good reason.¹⁰

As a fundamental matter, clients who are deciding whether they have the resources to save at all will be unable or unwilling to pay a substantial out-of-pocket fee that represents a significant portion of the assets they may have to invest. Further, fee-based arrangements are often not available to and/or do not make economic sense for many non-wealthy investors. Attached to this comment letter (Exhibit 1) is a chart demonstrating how a small saver with a monthly investment of \$100 could very well end up paying significantly more in total fees under a fee-based model than through a commission-based arrangement. And this example is not anomalous. An internal survey of NAIFA members revealed that for 78% of our members, *more than half* of their current clients would experience increased costs if their accounts were shifted from commission-based to fee-based arrangements; and for about 41% of our members, *more than 80%* of their clients would see such an increase (a strong argument against all advisors moving to an IA/IAR/fee-based platform).

Generally, under a brokerage model, investors pay a one-time commission when an asset is purchased or when “new money” in the account is invested. Under a fee-based model, on the other hand, investors pay regular (e.g., annual) fees for account “management” services based on the amount of all of the assets under management, not just “new money.” Thus, for some investors, the fee-based arrangement will likely result in unnecessary or excessive charges – for example, investors who buy and hold assets for a long period and do not require any real level of “management” (e.g., annuity and target fund purchasers) or investors who simply transfer money between investments in the same fund family (a move for which many commission-based advisors receive no additional compensation).

Ultimately, fee-based arrangements make the most sense for accounts with high balances. Indeed, advisory fee-based accounts usually carry account balance minimums for which middle-

⁹ Unlike NAIFA members, high-end, fee-for-service providers typically do not sell annuity products because their client base can self-annuitize extensive investment portfolios. On the other hand, low- and middle-income Americans rely heavily on annuity products of all kinds to provide them income security in retirement.

¹⁰ Milloy, Meghan, American Action Forum, *The Consequences of the Fiduciary Rule for Consumers* (Apr. 10, 2017), available at <https://www.americanactionforum.org/research/consequences-fiduciary-rule-consumers/>.

income Americans simply would not qualify. It is therefore vital to consumers working with NAIFA members to have non-fee options with respect to compensation arrangements.

NAIFA RECOMMENDATIONS ON THE PROPOSAL

I. Proposed “Advisor/Adviser” Titling Restrictions should be Amended to Be Meaningful for Consumers and Fair to Businesses.

For the following reasons, NAIFA urges the SEC to withdraw its proposed titling restrictions for BDs and RRs. To the extent the SEC feels more clarification is needed around titles using “advisor/adviser,” it is best provided through clear disclosures that explain advisors’ actual duties, obligations, and business arrangements, rather than a broad prohibition on use of these generic words.

A. The other components of the SEC’s proposal sufficiently address any potential consumer confusion and provide ample consumer protections.

The entire SEC proposal – which contains clear disclosure requirements, enhanced and/or clarified standards of conduct, and obligations to disclose, mitigate and/or eliminate conflicts of interest between financial professionals and their clients – is designed to minimize potential consumer confusion and harm. The package, we believe, will accomplish these important purposes without the need to prohibit the use of common descriptive words by a single segment of the financial services industry.

The focal point of the SEC’s proposal—the Regulation Best Interest—enhances the professional standard of conduct for BDs and RRs who are *advising* retail customers. Indeed, the first lines of the preamble to the Regulation Best Interest recognize this role of BDs and RRs:

Broker-dealers play an important role in helping Americans organize their financial lives, accumulate and manage retirement savings, and invest toward other important long-term goals, such as buying a house or funding a child’s college education. Broker-dealers may offer a wide variety of brokerage (*i.e.*, agency) services to retail customers ranging from providing customers with execution-only services (*e.g.*, discount brokerage), which typically does not involve advice, to *providing a range of services, including advice, to customers* (*i.e.*, full-service brokerage). Broker-dealers are typically considered to provide advice when they make recommendations of securities transactions or investment strategies involving securities to customers.¹¹

¹¹ 83 Fed. Reg. 21574, 21574-75 (emphasis supplied). Moreover, when describing the general objectives of the Regulation Best Interest approach, the SEC notes that it “considered the variety of products and services, *including the types of advice*, that broker-dealers provide to investors.” *Id.* at 21583. Practically speaking, someone who is readily recognized as providing advice—as a valuable service—to customers should not be legally prohibited from referring to himself or herself in that capacity.

Along with the enhanced standard of conduct, the Regulation Best Interest includes a Disclosure Obligation designed to fully inform consumers about potential conflicts of interest, and the scope and nature of the client-advisor relationship, including: the capacity in which the advisor is acting, the advisor's compensation, and scope of services to be provided. Mandating that such information be disclosed early in the advisor-client relationship enhances consumer protection and renders an overly broad titling restriction – imposed for the purported purpose of addressing consumer confusion about the role of an advisor – unnecessary.

Also, the proposed Form CRS requires *additional* disclosures to address potential consumer confusion about the financial professionals with whom they are working. Form CRS would require financial professionals to provide a description of the relationship and services provided (including a plain-English explanation of whether brokerage or advisory services, or both, will be offered), as well as applicable standards of conduct, fees and costs, and potential conflicts of interest.

Ultimately, the proposed titling restrictions are not necessary – taking into consideration the other provisions of the proposal – to assure consumers understand who they are hiring, for what services, at what cost, and under what legal standard of conduct. The disclosure items in the proposal go much further toward addressing consumer confusion and educating them about their rights, relationships, costs, etc., than the titling restrictions, which are not tied to consumers' understanding of these specific issues.

- B. “Advisor” and “adviser” are used throughout the financial services industry and prohibiting use of these words for a single segment of financial professionals will create an unfair bias against BDs and RRs and most importantly, will *not* result in consumers associating these terms only with IAs/IARs or any specific registration status, duties or obligations.

1. *“Advisor/adviser” does not equate to “IA/IAR” for consumers, but rather, connotes a wide variety of financial products, services and professionals.*

Many financial professionals are recognized as and/or refer to themselves as “advisors/advisers” or “financial advisors/advisers.”¹² These words are (aptly) used by professionals who offer advice on any number of financial topics, including: college funding, Social Security filing strategies, home ownership and other real estate decisions, risk management (e.g., long-term insurance products like life, disability, and long term care), tax and cash flow/management, estate planning, charitable giving, employee benefits elections, career/retirement decisions, and accounting. The effect of the SEC's proposal would be to eliminate use of “advisor/adviser” and

¹² As noted above, unlike “advisor/adviser” alone, “**investment** adviser” is a recognized term within the financial services industry rooted in federal and state law and connotes a particular licensure status with related obligations (i.e., those triggered by the Investment Adviser Act of 1940 or state law). It therefore is not broadly used in the financial services industry and NAIFA supports – consistent with current law – prohibition on use of that term/title by anyone not registered under the 40 Act or state law as an IA or IAR.

“financial advisor/adviser” only for BDs and RRs, not for any other financial professionals rendering any of these other types of financial advice.

Moreover, the proposal appears to treat RRs differently for purposes of the titling restrictions based on the entity/firm they are representing at any given time (e.g., the restrictions would not apply, according to the preamble, to a RR who is acting on behalf of a bank or insurance company, instead of a BD). As noted above, most NAIFA members are registered as RRs *and* are licensed insurance producers,¹³ allowing them to offer their clients a suite of products and services to maximize their overall financial health and security (e.g., a fixed annuity and life insurance offered along with a mutual fund as part of a single long-term financial planning strategy). Under the SEC’s proposal, the same professional may be recognized as an “advisor/adviser” when representing an insurance carrier, but not when acting on behalf of a BD – even though, functionally, recommendations about financial products are being delivered in both capacities to the same clients.

Ultimately, restricting use of “advisor/adviser” by BDs and RRs (when they are working on behalf of RRs) while those words are still broadly available to all other financial professionals will *not* lead consumers to understand “advisor/adviser” to mean IA/IAR. The words are simply too generic and widely used for such a narrow association, and the restriction likely will lead to more consumer confusion in the broader financial services space, not less.

Relatedly, the ubiquitous use of these words in financial services also calls into question a fundamental premise underlying the SEC’s proposal – that consumers somehow associate “advisor/adviser” with a particular type of licensing/registration and related services, products, legal obligations, etc. In fact, such an association is highly unlikely, given the variety of financial professionals publicly marketing themselves in this way. It is far more likely, we believe, that consumers understand “advisor/adviser” and/or “financial advisor/adviser” to mean someone who – at a purely functional level – provides advice about financial issues, not necessarily specific to investments and certainly not specific to a specific securities laws under which he or she may be registered.

2. *The SEC should not, via regulation, impose significant cost burdens or skew competitive dynamics against one segment of the financial services industry vis-à-vis other segments.*

We emphasize that the SEC’s jurisdiction is limited to securities-licensed professionals and therefore it cannot impose a more general prohibition on use of “advisor/adviser” in the larger

¹³ Insurance producers are recognized by regulators as providing advice to consumers. In fact, under the National Association of Insurance Commissioner’s (“NAIC”) model law for insurance producer licensing adopted in almost all states, advising clients is a key triggering element of states’ licensure requirement for these professionals. NAIC Producer Licensing Model Act, MDL-218 (Jan. 2005), available at <https://www.naic.org/store/free/MDL-218.pdf> (requiring insurance producer license for anyone who sells, solicits, or negotiates insurance, and defining “negotiate” as “the act of conferring directly with or offering advice directly to a purchaser or prospective purchaser of a particular contract of insurance...”).

financial services space. The result, however, of imposing such a prohibition on BDs and RRs alone is to create consumer confusion and competitive advantages/disadvantages in the marketplace – a prospect we believe the SEC wishes to avoid (as reflected in its product- and business-neutral proposal).

Imagine a scenario in which an insurance producer/RR (as described above) retained her insurance marketing and other client materials (which are driven and designed by insurance companies and marketing organizations, not the producers themselves) with reference to “advisor/adviser,” but had to remove such terminology from any securities product materials. The professional would have to refrain from using the prohibited words in conversations that cover both insurance and securities products, but she could still call herself an “advisor/adviser” for insurance product-only conversations. This situation would create confusion for the insurance producer/RR’s clients, as well as significant costs to update all materials, marketing, signage, legally-required disclosure documents, etc. – burdens that would not be imposed on non-RR insurance producers or the other financial professionals discussed above.

The SEC’s proposal acknowledges that a significant percentage (about 31%) of financial professionals providing brokerage services currently use “advisor” or “adviser” in their title. These firms and professionals have long-standing relationships with their clients and established marketing and sales practices/materials, and it will negatively impact them vis-à-vis other professionals who do not have to change longstanding practices or expend substantial costs associated therewith. There also will be significant loss of brand value and recognition built up by these businesses. Simply put, regulation should not provide a competitive advantage – or impose a competitive *disadvantage* – for one market segment over another.

- C. To avoid the practical challenges and negative consequences discussed above, any measure to address potential confusion around the use of “advisor/adviser” by BDs and RRs should be disclosure-based, not a blanket prohibition on use of these generic words.

Alternatively, to the extent the SEC still feels there should be more clarity around use of the words “advisor/adviser” by BDs and RRs, it should consider – in lieu of entirely prohibiting their use – providing such clarification via the proposal’s required disclosure items. For instance, consumer disclosures could state:

- “Investment advisor/adviser” denotes a particular type of license and standard of care (i.e., a fiduciary standard); and/or
- Use of the term “advisor/adviser” does not denote a particular type of license and may refer to a BD or RR who owes you a best interest standard of care.

In our members’ experience, consumers want to know the obligations owed to them by financial professionals, trust that the things they are told by their advisors are truthful, and understand the parameters of the client-advisor relationship (e.g., products and services offered, types of compensation, etc.). Removing the words “advisors/advisor” from some financial professionals’ titles does not convey this information. We therefore recommend that any additional consumer protections or clarification in this area – beyond the enhanced best interest standard and

disclosure items already included in the proposal – be in the form of plain language written explanations.

- D. If the SEC does finalize its proposed titling restrictions, clarification should be provided with respect to use by RRs of firm and trade association names that include “advisor/adviser.”

To the extent the SEC finalizes its proposed restrictions on the use of “advisor/adviser,” NAIFA urges the SEC to provide additional clarification regarding the ability of RRs to continue to use firm and trade association names that may include “advisor” or “adviser.” For example, many NAIFA members include the NAIFA name (National Association of Insurance and Financial *Advisors*) and logo on their business cards, email signature blocks, etc., to show their affiliation with the organization. Because NAIFA is not a BD or RR (and does not itself provide individual investment advice or services), the titling restrictions would not apply to our name. We request clarification from the SEC that so long as an individual RR’s name or title does not contain the prohibited words, those individuals would not be barred from using the NAIFA name and logo on client communications.

Similarly, some firm names include “advisor/adviser.” Assuming the firm is permitted to use those words as a dual licensee, the SEC should clarify that individual RRs may still associate themselves with the firm on communications to clients (e.g., business cards, documentation handed to consumers, marketing materials, email signature blocks, etc.). So, for instance, the following business card (or similar email signature) would be permissible, regardless of whether the firm and/or trade association name contains the words “advisor/adviser”:

<p>Jane Smith [Individual Title]</p> <p>[Firm Name] [NAIFA or other Trade Assn. Name/Logo]</p>
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II. Form CRS and Regulation Best Interest Disclosure Obligations should be Streamlined as Much as Possible to Be Helpful to Consumers, While Preserving Flexibility for Design and Delivery.

NAIFA members universally report that their clients are overwhelmed by, disinterested in, and not helped by the bulk of current disclosures required by law. Consumers simply will not wade through pages upon pages of disclosures, and NAIFA members feel strongly that adding *more* paper is not meaningful or helpful for their clients. Accordingly, NAIFA recommends that the SEC consolidate the contents of its proposed disclosure requirements – the Regulation Best Interest Disclosure Obligation and Form CRS, which both apply to BDs and RRs—and allow for incorporation of the desired disclosure elements into existing documentation.

As a general matter, NAIFA supports clear, concise, common-sense disclosures for consumers, which is consistent with the SEC's overall approach to its proposed disclosure requirements. We also agree that clients should receive – early in the client-advisor relationship – *all* of the information in the SEC's proposal, including:

- Material facts related to the scope and terms of the relationship, including the capacity in which the professional is acting (i.e., brokerage, advisor, or both), fees and charges (expressed in percentages, ranges, or the types of fees/charges),¹⁴ and type and scope of services;¹⁵
- Material conflicts of interest associated with a recommendation (to the extent known at the time of disclosure);
- Standards of conduct applicable to the services offered;
- A clear, high-level explanation of the key differences between advisory and brokerage accounts; and
- Helpful questions for consumers to ask when determining whether to work with a particular financial professional.

We are concerned, however, that there are significant overlaps of required information between the disclosure obligations in the proposal (i.e., Regulation Best Interest Disclosure Obligation and Form CRS) – for instance, describing the nature of the relationship and conflicts. There also is duplication between the proposal's required disclosures and what is already being provided by firms and advisors to their clients. Examples of introductory materials (e.g., firm brochures, account opening forms, etc.) from NAIFA members show that consumers already are receiving dozens of pages of information at the beginning of the client-advisor relationship. In many cases, the materials contain the very points proposed by the SEC (listed above).

Because the sheer volume of required disclosures already is problematic for clients and advisors, adding more only threatens to render *all* disclosures meaningless because consumers simply will avoid reading them. NAIFA therefore suggests that in lieu of imposing new disclosure requirements (i.e., something new to hand to clients), the SEC finalize a list of specific items of

¹⁴ NAIFA members feel that flexibility in how fees and costs are presented is important because of differences between products' compensation structures. For instance, providing a specific fee amount at the beginning of the client relationship would not capture trailer income to the advisor a long period later. We therefore recommend that advisors be permitted to disclose types of compensation they may receive (e.g., commissions, third-party payments, trailers), along with methods of calculation, percentages, or ranges – depending on what is most relevant and helpful in a given situation.

¹⁵ As discussed in more detail below, NAIFA cautions the SEC against designing disclosures that single out particular products or business models, which could signal that those products are somehow less appropriate than others – or that consumers should exercise extra caution when considering those products – regardless of the products' quality and/or client's actual needs and circumstances.

information, including those listed above, that must be included in *existing or new* disclosures provided at or before the time of a recommendation.

Required items of information could be accompanied by general instructions for presentation and delivery (akin to the proposed Instructions to Form CRS). For instance, NAIFA strongly supports a requirement that these disclosures be: provided in plain language, full and truthful, as concise as possible, and presented in any format that best conveys the information (e.g., charts, graphs, tables, etc.). NAIFA supports the SEC's proposal to maintain flexibility for firms to design their disclosures in the best manner for their customer base (so long as the information requirements and general instructions are satisfied).

With respect to timing of disclosures, NAIFA members agree that they should be provided early in the client-advisor relationship. Some members caution, however, that for meaningful disclosures (i.e., non-generic and somewhat tailored to the customer's situation) related to conflicts of interest and compensation, a certain amount of strategy, planning and narrowing of product options must first occur (i.e., likely cannot be provided at the first conversation/meeting with a client). Thus, these members recommend that disclosures be permitted up to the point when an actual recommendation is made.

We therefore think "at or before the time of a recommendation" is the appropriate standard because it will help consumers better understand and evaluate the recommendations they receive *and* will preserve flexibility for professionals who may be interacting with clients of various levels of financial sophistication, duration of relationship, and investment history.

Finally, while NAIFA does not oppose reasonable ongoing disclosure obligations, the SEC should not require regular disclosure (e.g., quarterly, annual, etc.) of any new information items, unless the information has materially changed. That way, consumers know that when they receive the information, it is not the "same old" they have already received and will be more likely to evaluate the new document.

III. Regulation Best Interest

NAIFA supports a best interest standard for BDs and RRs. Below we detail the core principles and key elements – most of which are consistent with the SEC's proposed Regulation Best Interest – we believe should underlie such a standard. Our recommendations with respect to the Disclosure Obligation are addressed above, so the following comments focus on the Care Obligation of the proposed Regulation Best Interest.¹⁶

- A. The SEC should finalize a principles-based best interest standard and avoid imposing unnecessarily prescriptive and onerous compliance obligations for BDs and RRs, which would harm smaller account holders and take away options in the marketplace.

¹⁶ While the Conflict of Interest Obligation will be impactful on NAIFA members and their clients, those particular requirements apply to BDs/firms. We do not anticipate that our members will ultimately design or control those systems, policies or procedures, and therefore that component of the Regulation Best Interest is not a focus of this letter.

NAIFA applauds the SEC's proposal of a truly principles-based best interest standard and its commitment to preserving consumers' access to a variety of products, professional advisors, and compensation arrangements. As explained above, there is no one-size-fits-all investment model that adequately or fairly serves all investors, and American consumers should be able to purchase the products they want under business arrangements that make sense for them. Any enhanced standard of conduct should therefore avoid interference with existing market dynamics and consumer choice via overly onerous and prescriptive regulations. We believe the SEC's proposal, which retains the suitability regime and builds upon it by making sure that clients' interests are put first in every recommendation, strikes the correct balance for consumers.

As a general matter, overregulation that creates unnecessary costs, administrative burdens, and complexity will harm consumers, particularly lower and middle-market investors. Costs will go up and access to professional advice and products will decline. Additionally, increasing administrative burdens and regulatory complexity will lead to more consumer confusion about advisors' and firms' obligations, not less. We recently saw all of these negative consequences come to fruition following the Department of Labor's ("DOL") highly prescriptive rulemaking for investment advice fiduciaries, and we agree fully with the SEC's assessment that the DOL's approach (or something similar) is *not* an appropriate path – or regulatory model – for ensuring availability of, or broad access to, the products and financial services that consumers want and need.

Accordingly, NAIFA supports the construct of the SEC's proposed Care Obligation, which focuses on thoughtful evaluation of products' and recommendations' general risks and rewards, and perhaps more importantly, products' and recommendations' fit for particular customers stated needs, goals and objectives and based on their specific investment profile. We also agree with the SEC that a "prudence" standard requiring reasonable evaluation of alternatives (not, for instance, identifying *the* best or *the* lowest cost product out of all existing products) and a reasonable basis for making a recommendation is appropriate.¹⁷ A stricter standard likely would limit availability of advice to smaller account holders and limit their product choices as well (i.e., to the lowest common denominator "vanilla" option).¹⁸

¹⁷ A prudent or "reasonable" standard also allows for varying perspectives and opinions among industry professionals with respect to products, recommendations, and compensation arrangements (i.e., avoids de facto elimination of entire classes of products from the marketplace). To illustrate, industry professionals' perspectives and opinions vary with respect to variable annuity products. Regardless of advisors' differing sentiments, however, consumers want to buy – and in fact seek out – variable annuity products because they provide unique benefits to consumers (i.e., guaranteed income, plus an opportunity to benefit from the "up side" of their investment, as wealthier individuals who are able to self-annuitize with their investment portfolios are able to do). Ultimately, any best interest standard should allow room for intra-industry differences in opinion and preserve consumer choice with respect to various products.

¹⁸ Similarly, although the Conflict of Interest Obligation will not fall directly on NAIFA members, we support the flexibility built into the Obligation by the SEC. As the SEC notes in the preamble, there are no one-size-fits-all policies or procedures related to conflicts that

B. The SEC should finalize several elements of its proposed Regulation Best Interest.

As noted above, NAIFA strongly supports the general principles-based approach the SEC has taken with its proposed Regulation Best Interest. We also encourage the SEC to finalize the following specific elements of its proposal.

1. *The Regulation Best Interest should not create any new private right of action or right of rescission.*

NAIFA applauds the SEC for not proposing to transfer its enforcement authority to private class action attorneys (e.g., via a contract requirement or any other mechanism). Such a transfer would have a very real and harmful impact on the marketplace and investors. Litigation risk under the DOL's now-defunct rulemaking – the cost of which could not fully be measured in advance – drove firms and advisors away from entire product lines, compensation arrangements, and low- and middle-income clients.

Of course, the SEC and FINRA already have enforcement mechanisms and penalties in place for firms and advisors who break the rules. Delegation of enforcement authority away from these existing mechanisms would only lead to untold litigation threats, including class action suits and potential class settlements, which would:

- increase costs for *everyone* in the industry;
- have a dampening impact on advisor-client relationships (e.g., advisors' willingness to recommend products or strategies, even if they were in a client's best interest), due to firms' and advisors' personal liability concerns; and
- create unwanted uncertainty around federal regulatory requirements because various state courts could be left to interpret their meaning and bounds.

These developments would be undesirable and are completely unnecessary. Consistent with the SEC's proposal, any new standard of conduct regime can and should avoid them by relying on

accommodate the variety of business models, firm sizes, client bases, and product offerings in the marketplace. Therefore, allowing firms to take these factors into account and determine which conflicts should be disclosed, mitigated, and/or eliminated, and design their policies and procedures accordingly, will help preserve optionality in the marketplace for consumers.

We also note that many firms have recently revised their conflict of interest policies and procedures in response to the DOL's rulemaking. Our members report seeing changes from their firms in non-cash compensation arrangements, bonuses, level compensation within product categories, educational and trip programming, event sponsorship, products offered on firm platforms, etc., and our members do not believe the firms will roll back any of these actions. Accordingly, the SEC should be mindful of the industry's already heightened sensitivity and attention to these issues, and should allow firms – without forcing them via regulation – to continue these positive developments.

existing federal enforcement authority, and not delegating such authority to private attorneys and state courts.

2. *The best interest standard should put clients' interests first and be based on what is in the best interest of each unique client, rather than overly prescriptive or generalized rules.*

NAIFA members generally support the SEC's decision to not define "best interest," but rather, to measure the standard in a client-specific and situation-focused manner. Among other reasons, attempting to define what "best interest" means will inevitably result in an imprecise, subjective standard. Our members emphasize that every client's situation is different, and *numerous* factors influence a particular recommendation and/or investment strategy. There simply is not a single, check list-type standard that will capture all of the variables that go into these decisions. A more appropriate standard therefore – as the SEC has proposed – takes a functional relationship-based approach and ensures that a thorough review occurs of every client's needs, goals, and resources, as well as the most appropriate products for them.

NAIFA also believes that the SEC's proposed requirement to put clients' interests "ahead of" a BDs' or RRs' interests is the appropriate standard. More specifically, we do not support a standard that requires recommendations to be made entirely "without regard to" BDs' or RRs' interests because those interests naturally are implicated in a commission-based payment model (which the SEC explicitly – and correctly – wishes to preserve as a good option for many consumers). A "without regard to" best interest standard could, as the SEC notes in its preamble, be construed to require "conflict-free" advice. This would limit options in the marketplace not only in terms of compensation structures, but also with respect to the offering of proprietary products, which are often long-standing, reputable, household-name products.

In general, "best interest" should not be conflated with "best performance" or "least expensive." The best- and worst-performing assets change constantly. Because no one can predict the future, diversification is essential to any investment strategy. Further, not all investment products are created equal – the quality and level of risk of different products can vary dramatically. And of course, clients' needs differ and fluctuate widely. Thus, in many instances, an appropriately diversified, high-quality and individually-tailored investment portfolio will not necessarily include the least costly products or the lowest risk products, but such a portfolio will be in the client's best interest.

Consequently, NAIFA agrees with the SEC that the following should not be required under a best interest standard (and we urge the SEC to include clarification on these points in its final rule):

- Elimination of all conflicts or "conflict-free" advice because, as the SEC recognizes, certain conflicts are inherent in a business transaction (i.e., professionals will be compensated based on services and sales);
- An obligation to recommend the least expensive or least remunerative product or strategy because there are often legitimate reasons and benefits for clients to invest in some

higher-cost and higher-risk products, and a “least expensive” standard is in no way tailored to individual clients’ needs;

- Wholesale elimination of particular products/product types, which again does not account for clients’ desire to purchase a variety of products based on their circumstances; or
- Inability of an advisor to execute a self-directed transaction by a customer or a transaction requested by the customer that is contrary to a RR’s recommendation.

Relatedly, any final rule should include clarification regarding what is permitted under (or not incompatible with) a best interest standard, including:

- Offering and recommending proprietary products or a limited range of products (notably, about which the advisor likely has extensive knowledge and experience and which consumers may seek out because of their brand-name quality reputation);
- Receiving variable compensation (e.g., commissions and third-party compensation), rather than flat fees, based on the sale of a product, which, as explained above, is a compensation model that *benefits* smaller account holders; and
- Executing transactions per a client’s instructions, even if the transaction is against the recommendation of the advisor (i.e., is not, under the advisor’s evaluation, in the client’s best interest).

3. *The best interest obligation should be clearly tied to the provision of a recommendation/advice to avoid unnecessarily restricting investment education and marketing of products and financial professionals.*

NAIFA supports the SEC’s proposal to tie the best interest standard to the point at which an actual recommendation is made. We also support the SEC’s reliance on existing guidance regarding what constitutes a “recommendation,” which appropriately focuses on what would reasonably cause a consumer to take a particular action or influence a consumer’s investment decisions. Importantly, current guidance clearly carves out from the scope of a “recommendation” general financial and educational information, including asset allocation models (within appropriate parameters), and would not encompass sales and marketing activities that are not tailored communications on which a reasonable person would rely.

This current approach strikes an appropriate balance that encourages financial professionals to provide much-needed investment education to consumers – particularly given the current savings crisis in the U.S. – and to promote the general value of working with a financial professional to achieve investment and savings goals. These services are especially important for new investors and smaller account holders.

4. *The best interest obligation should be imposed and evaluated at the time the recommendation is made.*

Fulfillment of the best interest obligation must be evaluated at the time a recommendation is made. When making a recommendation, advisors only have the information available at that time. Market volatility, changes in clients’ personal circumstances and goals, and fluctuation in the macroeconomic environment will occur. Advisors cannot be held accountable for those future eventualities, and therefore it is essential that the SEC retain language within the Care

Obligation clearly stipulating that advisors must act in the client's best interest at the time the recommendation is made.

NAIFA also agrees with the SEC that a best interest standard should not automatically create an ongoing or continuous duty to monitor a client's account, although advisors and consumers should be free to agree to, and define the nature of, any ongoing relationship via contract. Additionally, while the best interest standard applies to each recommendation and may not be waived or modified by contract as it applies to those recommendations, it should not be interpreted to create obligations with respect to other, expanded services (e.g., ongoing research and monitoring services, regular in-person meetings, etc.). Again, however, advisors and consumers may agree to expand the relationship in these ways on their own terms.

C. The SEC should modify its proposed Regulation Best Interest in the following respects:

1. *The SEC should clarify in final regulations that advisors may, when making recommendations, reasonably rely on the information provided by their clients as accurate and complete and that a "best interest" determination will be based on the information actually provided to the advisor.*¹⁹

The Regulation Best Interest, as noted above, is not designed as a "checklist" structure. Rather, it is based on advisors exercising due diligence and reasonably evaluating all of the pertinent circumstances and information related to a particular recommendation. Of course, advisors must rely on information from others – their clients – when making recommendations that are in those clients' best interest. Clients may inadvertently leave out information (not realizing it is relevant) or choose not to share certain information with their advisors.

The SEC should therefore stipulate in its final rules that advisors may – if they have exercised reasonable diligence and effort to elicit complete information from the client – reasonably rely on information provided by clients as both accurate and comprehensive. And in instances when clients are not completely forthcoming or honest, an evaluation of whether the advisor acted in the client's best interest will be based on the information the advisor actually was given (and not what s/he should have been given). These points could be included as disclosure items so that consumers fully understand the implications of providing incomplete or inaccurate information.

¹⁹ NAIFA members feel this clarification is particularly important, given the SEC's proposal to eliminate a scienter requirement for establishing a Care Obligation violation. Threat of frivolous and frequent suits over advisors' technical adherence to the best interest standard will result in unnecessary litigation costs and dampening of advisors' willingness to provide services to clients at all income levels. Clarification about clients' responsibility to provide accurate and complete information to their advisors so those advisors *can* conduct thorough best interest evaluations will, we believe, at least help curtail this problem. Some NAIFA members would encourage the SEC to take a step further and impose a scienter requirement for a best interest violation such that an advisor could only be found to violate the standard if he or she willfully failed to act in the client's best interest.

2. *In general, because all BDs and RRs must abide by the same enhanced best interest standard and related obligations, the SEC should avoid singling out certain products (e.g., variable annuities) and/or business models (e.g., proprietary products) for heightened scrutiny in its regulations and/or accompanying statements.*

The SEC explains at some length in the proposal's preamble that it intends for the Regulation Best Interest to be product- and compensation-neutral in order to preserve optionality in the marketplace for all investors – a premise NAIFA fully supports. Throughout the preamble, however, the SEC singles out certain products like variable annuities and proprietary products, suggesting they may require heightened disclosures, explanation and/or conflict mitigation (or elimination) measures.

Although these product-specific references are not in the text of the proposed regulations, they may suggest to those interpreting the regulations in the future that recommendations to purchase these products should not be evaluated on the same bases as other product options in the market. NAIFA strongly encourages the SEC to avoid any such implications or insinuations – and by extension, potential enhanced standards/obligations down the road – by removing these product-specific references from any rulemaking releases.

Rather, all products – including variable annuities and proprietary products – should be subject to the same principles-based best interest obligations. These products have specific benefits that consumers want and do seek out. For instance, proprietary products often carry trusted brand name recognition for households and those who sell them are specially trained in their features, options, benefits, costs, etc. With respect to variable annuities, they provide a much-needed guaranteed income stream to moderate- and low-income investors. They also allow these investors to take advantage of the upside of high-performing investments (something that wealthy investors are able to do outside of annuity products).

Variable annuities and proprietary products may have somewhat unique compensation structures and potential conflicts of interest associated with them – as with all products. The SEC should allow firms the same flexibility to identify and appropriately disclose, mitigate, and/or eliminate those conflicts as they do for other products. In other words, the rules should be – and are, as proposed – written in a way that they apply equally to all products, compensation structures, and business arrangements, and certain types of products need not and should not be singled out for special treatment or added burdens (in the final regulations or in accompanying statements from the SEC).

IV. Conclusion

In sum, in order to preserve access to financial professionals, a variety of products, and appropriate compensation arrangements for Main Street investors, and to avoid unnecessary interference with competition in the financial services marketplace, the SEC should:

- (1) Withdraw, or at the very least amend (to restrict use of “investment advisor/adviser,” rather than “advisor/adviser”), its proposed titling restrictions for BDs and RRs;

- (2) Streamline the proposed disclosure requirements (Form CRS and the best interest Disclosure Obligation) by distilling them into required information elements and general instructions for presentation but allowing them to be incorporated into existing (substantial) disclosure materials delivered at or before a recommendation;
- (3) Retain a principles-based best interest standard focused on individual clients' unique circumstances and goals with the above-referenced points of clarification regarding what the standard does and does not require; and
- (4) Avoid negatively singling out certain products (e.g., variable annuities) and/or business models (e.g., offering proprietary products), which may inadvertently give the impression that these products/models require increased scrutiny in the form of heightened disclosures, explanation and/or conflict mitigation measures.

Again, we appreciate this opportunity to provide comments and would be happy to answer questions or provide additional information.

Sincerely,

A handwritten signature in black ink that reads "Keith M. Gillies". The signature is written in a cursive, slightly slanted style.

Keith Gillies, CFP, CLU, ChFC
NAIFA President

Exhibit: Comparison of Commission-Based and Fee-Based Costs for a Small Saver

Exhibit 1

Comparison of Commission-Based and Fee-
Based Costs for a Small Saver

		COMMISSION - A SHARE				FEE BASED EXAMPLES			
		Portion of 12b1							
		Upfront 5.75%	fee broker	Total broker		Fee Based Acct		Fee Based	
		on New	receives to service	fees paid each		1.5% AUM**		Acct 1.2%	
New \$ In	EOY Balance	Money*	acct .25%	year	EOY Balance		EOY Balance	AUM**	
Year 1	\$ 1,200	\$ 1,215.00	\$ 69.00	\$ 3.04	\$ 72.04	\$ 1,266.00	\$ 18.00	\$ 1,269.60	\$ 14.58
Year 2	\$ 1,200	\$ 2,515.05	\$ 69.00	\$ 6.29	\$ 75.29	\$ 2,535.63	\$ 38.03	\$ 2,543.24	\$ 30.52
Year 3	\$ 1,200	\$ 3,906.10	\$ 69.00	\$ 9.77	\$ 78.77	\$ 3,875.09	\$ 58.13	\$ 3,890.74	\$ 46.69
Year 4	\$ 1,200	\$ 5,394.53	\$ 69.00	\$ 13.49	\$ 82.49	\$ 5,288.22	\$ 79.32	\$ 5,316.41	\$ 63.80
Year 5	\$ 1,200	\$ 6,987.15	\$ 69.00	\$ 17.47	\$ 86.47	\$ 6,779.07	\$ 101.69	\$ 6,824.76	\$ 81.90
Year 6	\$ 1,200	\$ 8,691.25	\$ 69.00	\$ 21.73	\$ 90.73	\$ 8,351.92	\$ 125.28	\$ 8,420.60	\$ 101.05
Year 7	\$ 1,200	\$ 10,514.64	\$ 69.00	\$ 26.29	\$ 95.29	\$ 10,011.28	\$ 150.17	\$ 10,108.99	\$ 121.31
Year 8	\$ 1,200	\$ 12,465.66	\$ 69.00	\$ 31.16	\$ 100.16	\$ 11,761.90	\$ 176.43	\$ 11,895.31	\$ 142.74
Year 9	\$ 1,200	\$ 14,553.26	\$ 69.00	\$ 36.38	\$ 105.38	\$ 13,608.80	\$ 204.13	\$ 13,785.24	\$ 165.42
Year 10	\$ 1,200	\$ 16,786.98	\$ 69.00	\$ 41.97	\$ 110.97	\$ 15,557.28	\$ 233.36	\$ 15,784.78	\$ 189.42
Year 11	\$ 1,200	\$ 19,177.07	\$ 69.00	\$ 47.94	\$ 116.94	\$ 17,612.94	\$ 264.19	\$ 17,900.30	\$ 214.80
Year 12	\$ 1,200	\$ 21,734.47	\$ 69.00	\$ 54.34	\$ 123.34	\$ 19,781.65	\$ 296.72	\$ 20,138.52	\$ 241.66
Year 13	\$ 1,200	\$ 24,479.88	\$ 60.00	\$ 61.20	\$ 121.20	\$ 22,069.64	\$ 331.04	\$ 22,506.55	\$ 270.08
Year 14	\$ 1,200	\$ 27,417.47	\$ 60.00	\$ 68.54	\$ 128.54	\$ 24,483.47	\$ 367.25	\$ 25,011.93	\$ 300.14
Year 15	\$ 1,200	\$ 30,560.70	\$ 60.00	\$ 76.40	\$ 136.40	\$ 27,030.06	\$ 405.45	\$ 27,662.62	\$ 331.95
Year 16	\$ 1,200	\$ 33,923.94	\$ 60.00	\$ 84.81	\$ 144.81	\$ 29,716.71	\$ 445.75	\$ 30,467.06	\$ 365.60
Year 17	\$ 1,200	\$ 37,522.62	\$ 60.00	\$ 93.81	\$ 153.81	\$ 32,551.13	\$ 488.27	\$ 33,434.15	\$ 401.21
Year 18	\$ 1,200	\$ 41,373.20	\$ 60.00	\$ 103.43	\$ 163.43	\$ 35,541.44	\$ 533.12	\$ 36,573.33	\$ 438.88
Year 19	\$ 1,200	\$ 45,493.33	\$ 60.00	\$ 113.73	\$ 173.73	\$ 38,696.22	\$ 580.44	\$ 39,894.58	\$ 478.73
Year 20	\$ 1,200	\$ 49,901.86	\$ 60.00	\$ 124.75	\$ 184.75	\$ 42,024.51	\$ 630.37	\$ 43,408.46	\$ 520.90
TOTAL	\$ 24,000		\$ 1,308.00	\$ 1,036.54	\$ 2,344.54		\$ 5,527.15		\$ 4,521.39

Assumes \$1200 annual deposit earning 7% (net of mutual fund fees).

*Broker doesn't receive all of this. Some goes to fund family and some to broker dealer. Upfront sales charge is also reduced by breakpoints.

**Most broker dealers have a platform fee of .20%. So the broker receives 1.3% or 1% in these examples.